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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 83-5088

LARRY GILBERT,

PETITIONER,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1982

NO. _____

LARRY GILBERT,

PETITIONER,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of South Carolina, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of South Carolina's denial of review of the Order of the Court of Common Pleas for Lexington County, South Carolina, in this case. Those Orders are attached to the Petition as Appendix A and B.

JURISDICTION

The judgment of the Court of Common Pleas was issued on November 23, 1982. The Petitioner filed a timely Notice of Appeal to the South Carolina Supreme Court. A Petition for a Writ of Certiorari pursuant to Rule 9 of the Rules Governing Post-Conviction Procedure was timely filed. The Petition was denied on April 6, 1983. He filed a timely Petition for Rehearing which was denied on April 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

This matter comes before this Court from Applications for Post-Conviction Relief filed by Larry Gilbert (hereafter Gilbert) and J. D. Gleaton (hereafter Gleaton) challenging their October, 1977, armed robbery and murder convictions and February, 1980, death penalty sentences. Each Application was denied after an evidentiary hearing by written Order dated November 23, 1982 (Petitioner's Appendix A). The appeal to the South Carolina Supreme Court was dismissed by a denial of a Petition for a Writ of Certiorari on April 6, 1983, and April 20, 1983.

Gilbert and Gleaton were indicted in the September, 1977, term of the Court of General Sessions for Lexington County for the July 12, 1977, armed robbery-murder of Ralph Stoudemire. They were brought to trial on October 4, 1977, and convicted of both offenses on October 6, 1977. On October 7, 1977, they each received the death penalty. Upon appeal to the South Carolina Supreme Court, their convictions were upheld and sentences vacated and remanded for resentencing. State v. Gilbert and Gleaton, 273 S.C. 690, 258 S.E.2d 890 (1978).

The resentencing hearing before a newly selected jury began on February 19, 1980, and resulted in each defendant again receiving the death penalty on February 26, 1980. Upon appeal, the death sentences were upheld by the Supreme Court. State v. Gilbert and Gleaton, 277 S.C. 53, 283 S.E.2d 179 (1981). In the trial, initial appeal, resentencing, and final appeal, the defendants were both represented by the same attorney, Robert W. Mance.

The criminal incident leading to this conviction and sentence can be summarized as follows: At approximately 1:00 P.M., on Tuesday, July 12, 1977, Gilbert and Gleaton stopped at Ralph Stoudemire's SOC Station in South Congaree after driving around the area searching for a place for a robbery. Gleaton entered the station, asked for cigarettes, and informed the shopowner that it was a robbery. Gilbert

remained outside until a struggle between Gleaton and Mr. Stoudemire began. During the struggle, Mr. Stoudemire received five stab wounds to his body, one being the fatal wound. Gilbert, who entered the store while the struggle was occurring, fired at the victim with a .22 calibre pistol wounding Mr. Stoudemire. The struggle continued outside his shop where the defendants and his dying father were viewed by the son across the street. The two men then left the scene. During the state post-conviction hearing, each defendant acknowledged his involvement in this murder.

Robert Mance became involved in the cases of Gilbert and Gleaton on July 15, 1977, when members of their family contacted him. He accompanied the family on July 15, 1977, for his first meeting with each defendant. During this meeting, he obtained and discussed copies of each of their inculpatory statements. They advised him that the statements were accurate. (PCR p. 767). After this meeting, Mance met with them on numerous occasions, as well as meeting with family members. Counsel discussed potential witnesses with the defendants and asked Charlie Gilbert to locate some in Salley, South Carolina. (PCR p. 764). Counsel reviewed the Solicitor's witness list with the Solicitor's office and learned the nature of their testimony. He also reviewed copies of the autopsy report, the incident report, and the statements of Gilbert, Gleaton, Bobby Carmichael, and Wilbert Gleaton. (PCR p. 816). Counsel reviewed the scene of the incident and photographs in preparation for the trial. In addition, he had both defendants sent to the State Hospital for a mental evaluation.

During his investigation and interviews, he was advised that the defendants were allegedly smoking marijuana and taking some pills. The day before the initial trial, he had each defendant write down what happened from the time of the arrest to the confession. In addition, he talked with each defendant alone about calling him as a witness.

In the 1977 trial, after the guilt phase conviction and prior to the sentencing phase, the trial judge made an inquiry about the existence of a conflict of interest and the satisfaction of each defendant with counsel's representation. In particular, the judge made inquiry of the Petitioner, his co-defendant, and counsel concerning the potential for a conflict of interest. (TR-I, Addendum, pp. 881-885). Prior to that inquiry, counsel Mance advised the trial court that he had fully discussed "matters of argument concerning degrees of culpability." (TR-I, Addendum, pp. 876-883). At the state post-conviction hearing, counsel affirmed that culpability was discussed with both defendants. (PCR p. 826, ll. 9-19).

Counsel represented the Petitioner on appeal to the South Carolina Supreme Court. After the sentence was vacated, counsel represented the defendants in the resentencing proceeding in 1980.

REASONS WHY THE WRIT SHOULD BE DENIED?

I.

THE DECISION BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE CONCERNING WHETHER AN ACTUAL CONFLICT OF INTEREST EXISTED WHICH ADVERSELY AFFECTED THE REPRESENTATION IN ACCORD WITH THE DECISIONS OF THIS COURT IN CUYLER V. SULLIVAN AND WOOD V. GEORGIA.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.E.2d 333 (1980), the Supreme Court stated, regarding multiple representation, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S.Ct. at 1718. Thus, a mere showing of multiple representation is not enough; to obtain a new trial, a defendant must show an "actual conflict of interest." The Cuyler opinion went on to stress, however, that a defendant "who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice ... ." Id. at 349, 100 S.Ct. 1718. But as the lower court asserted, the conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation. Accord. U.S. v. Martorano, 620 F.2d 912 (1st Cir. 1980).

In order to establish an actual conflict of interest, the petitioner must prove two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. Foxworth v. Wainwright, 516 F.2d 1072, 1079 (5th Cir. 1975). He need not show that his defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. Id. Second, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests. Brien v. U.S., 695 F.2d 10 (1st Cir. 1982). The Petitioner has not made this showing.

Gilbert argues that the potential conflict prevented his attorney from calling Bobby Carmichael to testify that the police allegedly denied Carmichael's request to make telephone calls upon his arrest which would corroborate Gilbert's similar testimony in the suppression hearing. The record reflects that counsel Mance discussed the possibility of having him testify for Gilbert but "the State wanted to use [him]." (PCR p. 195). There was no testimony presented that Carmichael viewed or heard the Petitioner being denied the opportunity to make a telephone call. Therefore, upon careful examination, the tactics Gilbert suggests that his attorney could have pursued appear to be merely hypothetical choices that in reality could not have benefitted Gilbert and were often not in any conflict with counsel Mance's other loyalties. Counsel testified at the state hearing that it was his assessment of Carmichael's testimony that it was a risk that he did not want to take and it would not be in their best interest to call him. (PCR pp. 775, 808-809). Carmichael's statement to the police on July 14, 1977, implicated both co-defendant Gleaton (PCR p. 205, ll. 15-17) on a statement he made to Carmichael and implicated Gilbert in which Gilbert told him the "car was involved in an armed robbery and murder charge." (PCR p. 206, ll. 13-15). Here evidence was equally damaging against both Petitioners in the guilt phase area and trial counsel's fears were accurate and informed. Furthermore, during the post-conviction hearing, each defendant fully admitted his involvement in the murder armed robbery.

The Petitioner contends that counsel's representation of both parties caused counsel to fail to present mitigation in the way he now desires to have done it. The trial record was uncontradicted that Gleaton was in the store and Gilbert "only" shot the victim who died as a result of stab wounds. The record showed that Gilbert was ten years younger than his thirty-one year old codefendant.

Counsel did not fail to present or pursue any defense or mitigation strategy because of the representation of each defendant. He did what lawyers are necessarily limited to do; present the facts of the case to the jury in their best light. Here, the defendants would not place the blame on each other. The lower court factually rejected the claim that Gleaton got Gilbert involved with drugs. Even if that factor existed, it did not cause a "conflict of interest." The defenses and strategies were entirely consistent in this case. U.S. v. Ramsey, 661 F.2d 1013 (4th Cir. 1981). There is no constitutional requirement that a mere potential conflict of interest requires vacation of a sentence or conviction.

The Petitioner requests this Court to consider it with U.S. v. Flanagan, 679 F.2d 1072, cert. granted, Flanagan v. U.S., No. 82-374, __U.S.__, 32 Crim.L. 4145 (1/10/83). Flanagan concerns a Federal District Court disqualification of counsel based upon a potential conflict of interest pursuant to Fed.R.Crim.P. 44(c). The issues in Flanagan are not similar with this case and involve whether the district court abused its supervisory discretion regarding the issue of conflict of interest. It concerns whether criminal defendants have an absolute right to the lawyer of their choice. These issues are not presented in this case.

Accordingly, it is submitted that this Court should deny certiorari.

II.

THE DECISION IN THE LOWER COURT CORRECTLY DECIDED THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL APPLYING THE STANDARD APPLIED BY THIS COURT IN McMANN V. RICHARDSON.

The issue concerning the standard applicable to claims of ineffective assistance of counsel is presently before this Court in Strickland v. Washington, No. 82-1554. Respondent submits that the facts of this case, as found by the lower court, support the legal conclusion that the Petitioner was not denied the effective assistance of counsel within the standard of competence demanded of attorneys practicing criminal law. McMann v. Richardson, 397 U.S. 759 (1970).

Contrary to the Petitioner's position presented in his Petition, counsel conducted an investigation and attempted to find witnesses in his client's behalf, sent his client to the State Hospital for a mental evaluation, discussed the condition of the Petitioner at the time of the crime concerning the ingestion of alcohol or drugs, learned and presented to the jury the degree of participation in the murder. The state post-conviction court found that the Petitioner was adequately and effectively represented at all stages. It found that any witnesses proposed to be presented were not crucial and did not have close contact with the petitioner at or near the time of the crime.

There is no conflict in the circuits or states that the determination of whether defense counsel was ineffective must be based on the totality of the circumstances. Ward v. U.S., 694 F.2d 654 (11th Cir. 1983). It is equally clear that counsel's advice need not be errorless, and need not involve every conceivable defense, no matter how peripheral to the normal focus of counsel's inquiry, but it must be within the realm of competence demanded of attorneys representing criminal defendants. Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, supra. The record before the lower court

reflected an assiduous, competent, and reasonably effective defenses and mitigation strategy.

A petitioner who seeks resentencing through allegations of a discrete failure by his trial attorney's investigation of, and preparation for, his sentencing hearing may not rest on proof only of the failures alleged and its constitutional dimension. He also shoulders the burden of proving that his counsel's ineffectiveness resulted in an actual and substantial disadvantage to the course of his defense. Baldwin v. Maggio, 704 F.2d 1325 (5th Cir. 1983). Here the petitioner was unable to meet such a showing.

For all the foregoing reasons, the Petition for Certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Assistant Attorney General, do hereby certify that I have served Respondent's Brief in Opposition to Petition for Writ of Certiorari on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

Vance Cowden, Esquire
University of South Carolina Law School
Columbia, South Carolina 29208

This 19th day of August, 1983.

DONALD J. ZELENKA